

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

MAR 29 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2006-0396-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
CHARLES F. WEAVER,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20031580

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Charles F. Weaver

Douglas  
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Charles Weaver was convicted of two counts each of driving under the influence of alcohol (DUI) and driving with an alcohol concentration of .08 or greater, with a suspended or revoked license or with two prior DUI convictions. He was sentenced to concurrent, mitigated prison terms of 2.5 years. This court affirmed his convictions and sentences on appeal. *State v. Weaver*, No. 2 CA-CR 2004-0053 (memorandum decision

filed Jan. 21, 2005). Weaver now seeks review of the trial court's summary dismissal of his subsequent petition for post-conviction relief,<sup>1</sup> filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We review for an abuse of discretion a trial court's ruling on a post-conviction petition, *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001), and find no abuse here.

¶2 In his petition, Weaver claimed 1) his trial had been unfair because the state had conducted an unduly suggestive identification procedure, 2) he was unable to cross-examine the arresting officer who no longer lived in Arizona, 3) the state mishandled critical blood evidence, 4) the prosecutor committed misconduct, 5) trial counsel was ineffective in failing to call a critical alibi witness, and 6) both trial and appellate counsel were ineffective in numerous ways. In denying relief, the trial court noted that Weaver had not provided it any trial transcripts or affidavits to support his claims of ineffective assistance of counsel and that appointed counsel had previously filed a notice stating she could find no issues to raise. The court found Weaver's claims were precluded because he had not presented any material issues of fact or law.

¶3 A petitioner's failure to present material issues of fact or law, however, does not render a claim precluded; it simply constitutes grounds for the denial of post-conviction relief. *Compare* Ariz. R. Crim. P. 32.2(a) *with* Ariz. R. Crim. P. 32.6(c). The court

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<sup>1</sup>According to its ruling, the trial court actually dismissed Weaver's "requested relief"; we presume the court intended instead to dismiss Weaver's petition. *See* Ariz. R. Crim. P. 32.6(c).

nevertheless correctly ruled that all but the ineffective assistance of counsel claims were precluded. Weaver's first four claims are precluded as waived because they are appeal issues, but he did not raise them on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶4 We find no merit to Weaver's contention that those claims are not precluded because he is claiming actual innocence under the exception to preclusion found in Rule 32.1(h). *See* Ariz. R. Crim. P. 32.2(b). That his defense at trial was that he had been the passenger in the vehicle, not the driver, does not turn his post-conviction claims into actual innocence claims. An actual innocence claim under Rule 32.1(h) is one in which a "defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty . . . beyond a reasonable doubt." The jury already considered and rejected Weaver's claim that he was innocent of DUI because he was not the driver. And Weaver asserted only claims of trial error in his precluded post-conviction claims, not claims affecting his guilt or innocence.

¶5 The ineffective assistance claims could not be precluded because Weaver had never had a previous opportunity to raise them, this proceeding being his first Rule 32 proceeding. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective assistance of counsel claims may only be raised in post-conviction proceedings). To state a colorable claim of ineffective assistance of counsel, however, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional standards

and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to meet one requirement, a court need not address the other. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992).

¶6 As the trial court noted, Weaver did not present any affidavits in support of his claims that counsel were ineffective. More importantly, however, his claims were primarily general assertions, without elaboration, that trial and appellate counsel "made numerous errors." Despite his statement that he had "explained in detail in [his] petition" trial counsel's errors, Weaver's only specific allegation about trial counsel was his failure to call as a witness Larry McKinney, the other occupant of the vehicle, whom Weaver asserted would have testified that Weaver had not been driving. But he presented no affidavit by McKinney to that effect. In fact, Weaver did not even show McKinney was available to testify at trial. Accordingly, he failed to state a colorable claim of ineffective assistance of counsel. *See Salazar*, 173 Ariz. at 414, 844 P.2d at 581; *see also State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (colorable claim is "one that, if the allegations are true, might have changed the outcome").

¶7 And Weaver's complaints about appellate counsel were similarly vague and insufficient. He simply claimed counsel had never spoken to him during the appeal nor addressed the issues Weaver wanted to raise and raised only "inconsequential" issues on appeal. But the choice of issues to raise on appeal is counsel's. *See State v. Alford*, 157

Ariz. 101, 103, 754 P.2d 1376, 1378 (App. 1988); *see also State v. Smith*, 169 Ariz. 243, 247, 818 P.2d 228, 232 (App. 1991) (counsel's failure to raise all claims defendant wants to assert is not ineffective assistance of counsel).

¶8 We therefore conclude the trial court did not abuse its discretion in summarily dismissing Weaver's post-conviction petition. *See Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d at 150. We grant the petition for review but deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge